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BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF MEMBERS OF THE STATE BAR OF ARIZONA,	PDJ – 2011-9002
Rachel R. Alexander, Bar No. 020092 Respondent	**RACHEL ALEXANDER'S CLOSING ARGUMENT**

As to Rachel Alexander, this matter began with a simple question: "Why is Rachel Alexander here?" Counsel asked this question, because from the moment a screening investigation into her actions began it was apparent that Rachel's role in *Arpaio, et al. v. Maricopa County Board of Supervisors, et al.,* U.S. District Court, District of Arizona, Case # 2:09-cv-02492-GMS (the "RICO Matter") was misunderstood and exaggerated. Although Rachel's name was typed in the signature block on the amended complaint that was lodged but never filed by Peter Spaw (the "Amended Complaint") and the response to the various motions to dismiss that was filed by Spaw (the "MTD Response"), Rachel was not "lead counsel" in the RICO Matter. That was Peter Spaw who was Rachel's supervisor. Although Spaw attempted to deny such a role, his testimony was not credible and indeed the evidence demonstrated that he was calling the shots and was, at all times, in control. Worse yet, the evidence demonstrates Spaw was at the same time using Rachel as a figure head to hopefully insulate him from any

fallout from the RICO Matter. To be sure, Rachel did substantial work on the RICO Matter, but she did so with less than all of the information. As the evidence demonstrates Rachel was misled, never given all the facts, and in the end failed by the experienced lawyers she trusted and looked to for guidance. Thus, the mere fact that she worked on the RICO Matter is insufficient to find her unethical and deny her the ability to practice law for even a single day. Instead, the Independent Bar Counsel ("IBC") was required to demonstrate by clear and convincing evidence that Rachel's motives were improper and/or her acts unreasonable based on what she knew during the time she worked on the RICO Matter. The IBC did not meet this burden. Moreover, IBC failed to demonstrate that any act that Rachel took caused anyone harm. Under these circumstances, declaring a young and inexperienced lawyer who was misled by those she trusted unethical and punishing her would itself be a miscarriage of justice. Consequently, the charges brought against Rachel must be found to be unsubstantiated and she must be exonerated.

I. LEGAL STANDARDS

The starting point for this matter is one irrefutable point of law: the IBC bears the burden of proving by clear and convincing evidence that Rachel violated any rule of ethics or rule of the Supreme Court of Arizona. "The clear and convincing standard is intermediary between the rigorous criminal standard of proof beyond a reasonable doubt and the modest civil quantum of preponderance." *State v. Renforth*, 155 Ariz. 385, 386, 746 P.2d 1315, 1316 (Ct. App. 1987). While it does not require the near certainty of the beyond a reasonable doubt standard, the clear and convincing standard in order to be met evidence requires evidence that demonstrates "an extra measure of confidence by the factfinders in the correctness of their judgment." Id, 155 Ariz. at 387, 746 P.2d at 1317. As one court has stated:

> For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true.

In re Sedillo, 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972).

Similarly as the California Court of Appeals noted:

> Clear and convincing" evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.

In re David C., 152 Cal. App. 3d 1189, 1208, 200 Cal. Rptr. 115, 127 (Ct. App. 1984)

Put, perhaps more simply, in order to meet their burden of proof, the IBC was required to prove that it is "highly probable" that Rachel violated a rule of ethics. *See generally*, RAJI (Civil) SI 3 (4th ed.).Yet, regardless of how the standard is formulated, the IBC simply failed to present evidence sufficient to demonstrate with "an extra measure of confidence" that Rachel violated a rule of ethics during the short period of time she was involved in the matters at issue in this hearing.

William Safire advised: "Last, but not least, avoid clichés like the plague." But this matter cannot ignore the cliché that "hindsight is 20/20." Psychologists describe this as "hindsight bias," which is the tendency to view events after they occur as more predictable than they really are. Not surprisingly, the Supreme Court has warned that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421, 127 S. Ct. 1727, 1742, 167 L. Ed. 2d 705 (2007). For its part, the Arizona Supreme Court has equally warned of the danger of employing hindsight in evaluating the work of lawyers: "our profession is one in which hindsight is a meager measure of counsel's competency."*State v. Flewellen*, 127 Ariz. 342, 344, 621 P.2d 29, 31 (1980). Thus, when evaluating Rachel it must be considered that much is known today that was not known in 2009 and 2010. Throughout this matter Rachel learned that significant information was kept from her, that people she trusted she should not have, and that lawyers she relied on for advice and guidance failed her. While these failures do not relieve Rachel of her duty to comply with the rules of ethics, they did deprive her of the opportunity to make decisions and act with all of the relevant information. October 20, 2011 Testimony, at p. 114, ll. 4-19.

Finally, the purposes of lawyer discipline must also be considered in resolving this matter. It is axiomatic that lawyer discipline matters are neither criminal nor civil in nature. This is evidenced by the fact that there is not a punitive or restorative purpose to lawyer discipline. Instead, primarily "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice..." ABA's Standards for Imposing Lawyer Sanctions, as amended February 1992. At no point in these proceedings has evidence been presented that Rachel poses any danger to the public or the administration of justice such that discipline is warranted, nor that she is likely to be in similar circumstances to that presented in the RICO Matter. Indeed, the IBC has not even presented evidence that Rachel's actions in working on the RICO Matter caused harm, as set forth below.

II. FACTUAL BACKGROUND

A. Rachel is asked by the chief lawyer in Maricopa county to work on the RICO matter

Rachel Alexander was a special assistant county attorney who in December 2009 was asked to assist with the RICO Matter. Given the high profile nature of the RICO Matter, the complexity of the causes of action asserted, and her limited experience with RICO cases, Rachel resisted and questioned whether she was the best choice for the assignment. In no uncertain terms, Rachel told Thomas her experience with RICO actions was limited to a few cases she had worked on while at the Attorney General's Office. In response, Thomas told her that she would effectively be co-lead counsel with fellow assistant county attorney Peter Spaw, who did have extensive civil experience and experience with state racketeering matters, until such time as Thomas could obtain outside counsel to assume the matter. At that time, Thomas assured Rachel that she and Spaw would be provided the resources necessary to properly and effectively prosecute the matter. Thus, while she recognized the RICO Matter would be a challenge both legally and professionally, Alexander accepted the assignment based on the promises of help and guidance from more experienced counsel. See e.g., October 12, 2011 Trial Testimony, at p. 113, l. 20-p. 114, l. 114. Given that she was asked to assume this role by Thomas who was the chief lawyer in Maricopa County and her boss, it is not surprising that

Rachel accepted the assignment. Any attempt to criticize her for doing so, improperly employs hindsight and requires ignoring the situation with which Rachel was faced.

B. Rachel did not have all the information..

While Rachel accepted this assignment based on a promise, there was much that she did not know. Most significantly, Rachel did not know that other experienced attorneys had advised against proceeding with a RICO action. This included warnings from Chief Deputy Phil MacDonnell, Barnett Lotstein, and even Peter Spaw. Rachel also did not know that Spaw had been consulted by the Maricopa County Sheriff's Office two months earlier about bringing such an action and had advised Chief Deputy Hendershott against it. Rachel also did not know that Spaw had spoken with Eric Dowell and other lawyers with the law firm of Ogletree Deakins about a RICO action—and again that Spaw and Dowell had advised the Chief Deputy not to proceed. Thus, while much was made by IBC about the warnings that were given about the RICO Matter, those warnings were kept from Rachel.

C. Spaw failed Rachel and used her to try to protect himself.

Admittedly, Spaw did provide a warning of sorts to Rachel in the form of a December 31, 2009 email where he compared the RICO Matter to the infamous HMS Titanic. But, when this "warning" is put in context it is evident that it is nothing more than one of many mixed messages that Spaw sent to Rachel. For example, at no point does the December 31st email advise that the RICO Matter should or must be dismissed. Exhibit 415. Instead, Spaw advised Rachel that the she needed to immediately set out to gather the factual support for the RICO Complaint. As set forth below—that is precisely what Rachel attempted to do. Further, Spaw followed up his December 31st email on January 6, 2010 with an email where he again makes no suggestion that the RICO Matter should be dismissed but instead suggests the contemplated Amended Complaint "critically depends on the use of mail to trigger the conflict and to justify the failure to appoint a special prosecutor." Exhibit 445. Spaw then further instructs Rachel to "let me know where you are regarding timeline and supporting documents." In fact, at the time the proposed Amended Complaint was filed, Spaw offered no warning, no statement of

reluctance, and instead sent an email saying "Outstanding job Rachel. Well Done! Let's get this filed and see what happens..." Exhibit 458.

Time and again, this was Spaw's tact—to give Rachel a warning in writing but at the same time to give her instructions as to how she was to proceed. Considering his advice to Chief Hendershott prior to the filing of the RICO Matter, his conversations with Eric Dowell and his testimony regarding his belief that the RICO Matter should have been dismissed, it cannot seriously be debated that Spaw failed Rachel as a supervisor and a mentor. As the evidence demonstrated, in early December 2009 Rachel was assigned to Spaw's bureau. Almost immediately Mark Faull, who had concerns about Rachel's experience and skills as a civil litigator, went to Spaw to discuss Rachel's experience and what Faull and the MCAO expected of Spaw in his supervision of Rachel. October 12, 2011 Trial Testimony, at p. 115, l. 22-P. 117, l. 4. Faull advised Spaw that Rachel was relatively inexperienced and that as a result Spaw would have to closely supervise Rachel to ensure that she was receiving the guidance and advice she needed for the RICO Matter. As a supervisor, Faull also made it clear that Spaw was expected to be familiar with Rachel's assignments, aware of her skill set and experience level, provide training and mentoring "on the job," and make sure that Rachel followed the law and rules of the court, including all ethical rules. *Id.*, at p. 115, l. 1-21. MacDonnell lagely agreed with Faull's description of Spaw's responsibilities as Rachel's supervisor. September 15, 2011 Trial Testimony, at p. 131, ll. 18-20; p. 132, ll 24-25, p. 133, ll 1-8.

For his part, during his testimony, Spaw on the one hand acknowledged his duties and responsibilities as a supervisor in the MCAO but on the other attempted to portray his role as limited to making sure Rachel had paralegal or secretary help as she needed it. In this regard, Spaw was not credible. Incredibly, at first he even attempted to deny that he was Rachel's supervisor:

> Q. ...you did supervise Ms. Alexander in her handling of the Federal racketeering action after she got it. Is that accurate?
>
> A. No, sir, that's not accurate. I supervised her from an organizational standpoint only, but I never supervised her from a managerial standpoint. I never

> managed her. I never managed the litigation. And I made that clear to Mr. Thomas, and Mr. Thomas agreed.

October 17, 2011 Testimony, at p. ll. 14-21.

Then, after being impeached by the IBC with his own contradictory deposition testimony, Spaw begrudgingly acknowledged that he was Rachel's supervisor. *Id*, at p. 133, l. 9-p. 135, l. 19. Yet, incredibly, Spaw continued to deny that he played a significant role in the RICO Matter and instead tried to lay blame at Rachel's feet. However, Spaw was confronted with email after email which demonstrated that not only was he involved but that he was in charge. For example:

- On December 28, 2009 Spaw wrote in an email to Sally Wells that "there were no instructions or suggestions that my role be limited, I volunteered for a number of important tasks requiring immediate attention and will continue to coordinate efforts to see that all issues are addressed in a timely manner." Exhibit 436.

- On January 6, 2010 instructing Rachel to focus on "the use of mail" and to let him know where she was "regarding [a] timeline and supporting documents." Exhibit 445.

- Spaw time and again communicated directly with Thomas about the progress he and Rachel were making and changes that might be made. *See, e.g*, Exhibit 404. Until on January 13, 2010 Spaw wrote to Thomas that "I can have a final proof-read draft [of the Amended Complaint] completed by mid-afternoon and could file as early as tomorrow. I will get you a copy of the proposed final product and await your instructions before proceeding further." Exhibit 447.

- Similarly, Spaw met several times with Thomas—***without Rachel***—regarding the RICO Matter.

- Instructing Rachel as to the tasks that she should and should not be working on. Most significantly, this included Spaw's instruction to Rachel on January 11. 2010 that: "By copy of this email to Ms. Alexander, I am advising that efforts at structuring an amended complaint may best be considered completed…and that efforts should now be directed to preparing responses to the Rule 12(b) motions" and directing Rachel "to have to me, by this Wednesday a comprehensive outline of the" MTD Response. Exhibit 407.

Despite Spaw's denials, contemporaneous evidence of him directing Rachel's tasks, requiring her to report progress to him, and that Spaw was the one working with Thomas to finalize and file documents confirms that Spaw—and not Rachel—was in charge and making decisions as to how the RICO Matter progressed. Perhaps not surprisingly given his testimony, a screening investigation has begun into not only Spaw's role in the RICO Matter but his efforts to obfuscate that role during discovery in ***this*** matter. October 18, 2011 Transcript of Sidebar.

In addition to revealing the true nature of Spaw's role in this matter, the emails demonstrate that Spaw used Rachel to portray to lawyers outside the MCAO that his role was limited. For example, while Spaw took it upon himself to exclusively communicate with lawyers representing the Defendants in the RICO Matter, to those lawyers he pretended that his role was limited. For example, on January 25, 2010 Spaw told Martin "Ms. Alexander has decided that one pleading will be filed…It would be so appreciated if you could assist me in assisting Ms. Alexander by getting me clearance from all defense counsel to sign the attached stipulation…" Exhibit 395. Spaw of course was doing much more than simply "assisting" Rachel as he led Martin to believe. Perhaps to further his ruse, Spaw forbid Rachel from communicating with opposing counsel: "[i]n the event that any calls were to come in from adverse counsel between…it would be best to forward the call to me to return. I have already established a relationship (of sorts) in discussing procedural issues and it would be best, for the time being, that they deal with only one of us at a time." Exhibit 403.

In sum, while Spaw was supposed to serve equally as a mentor and supervisor, he failed Rachel by keeping information from her and attempting to set up a scenario whereby she would take the fall for his decisions and directions.

D. Rachel's role in the RICO Matter.

Believing she would have the support and guidance she needed, and never being one to shy away from a challenge, Rachel immediately began the process of educating herself on the myriad of legal issues raised in RICO cases generally and in this matter specifically. Quite literally, from the moment she accepted the assignment, Rachel put aside many other

professional and personal commitments so she could spend countless hours conducting legal research, reviewing file documents, and meeting with Spaw and others in order to advance the RICO Matter properly, professionally, and as best she could.

At first, it appeared that lawyers with Ogletree Deakins and assistant county attorney Jeff Duvendack would assist with the RICO Matter. Accordingly, Spaw set a conference call on or about December 28, 2009 to discuss the multitude of tasks that needed to be accomplished. During that call Spaw and Dowell emphasized not that the matter needed to be dismissed, but that an amended complaint should be prepared and filed. To accomplish this Spaw and Dowell emphasized that the factual support for the Original Complaint needed to be gathered and reviewed. Rachel took this advice to heart, and she immediately reached out to Thomas and asked him how she should efficiently go about gathering the documents that supported the factual allegations of the original RICO complaint. Thomas assured her that such documents existed and suggested she contact Lisa Aubuchon and Sally Wells. Rachel followed that instruction and reached out to both attorneys. Thereafter, Aubuchon provided her with some documents and told her to speak with Wells to gain access to additional documents that Rachel understood were electronically stored. With Wells' assistance, Rachel then obtained access to what she understood to be the investigative file that formed the basis of the RICO Matter.

For his part, Spaw made no effort to assist Rachel in gathering the supporting documents from lawyers with the MCAO, the MCSO who he had previously consulted with on the RICO Matter, or anyone else. Spaw did, however, begin to assist Rachel with the preparation of an amended complaint. To that end, Spaw prepared the initial draft of what would become the Amended Complaint. Exhibit 447. In that initial draft, Spaw made the decision to effectively "cut and paste" the Original Complaint into the Amended Complaint. Spaw, Rachel and, occasionally, Thomas, then revised the proposed amended complaint over those two weeks. In the interim, the RICO Defendants had begun to prepare and file motions to dismiss the Original Complaint. On January 11, as set forth above, Spaw declared the Amended Complaint nearly complete and instructed Rachel to move on to working on the

MTD Response. Rachel followed Spaw's direction. Over the next few days Spaw and Thomas, with little input from Rachel, finalized the Amended Complaint and on January 14, 2010 Spaw—using his United States District Court electronic case filing login and password—"filed" the Amended Complaint. Spaw, however, had failed to get the consent of either the Court or the defendants for the filing of such an amendment and thus on January 20, 2010, Spaw prepared and filed a motion to effectively retroactively obtain approval to amend the complaint. The majority of the defendants opposed this motion and it was never ruled on by the Court. Consequently, while the Amended Complaint was lodged it was never accepted for filing.

On January 29, 2010, Spaw—again using his login and password filed the MTD Response which he and Rachel had prepared. However, before the Court could rule, Plaintiffs with the assistance of Rachel, Spaw, and Robert Driscoll with the law firm of Alston & Bird, and others, made the decision to voluntarily dismiss the matter. Accordingly, on March 11, 2010, the matter was dismissed. Significantly, while Spaw played a role in deciding to dismiss the RICO Matter, Rachel played no role. *See e.g.* Exhibit 484. Moreover, while IBC has continually tried to portray Rachel as continually pushing the RICO Matter to go forward, at no point did she object to the dismissal of the RICO Matter.

Two additional things must be noted about the RICO Matter: First, the assigned United States District Court Judge did not sanction or otherwise criticize Rachel or her actions, despite having the power to *sua sponte* sanction any lawyer that appears before the District Court. *See* generally, Fed. R. Civ. P. 11(c)("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b); *see also United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001).

Second, the IBC failed to offer ***any*** evidence that the way in which the RICO Matter was litigated by Spaw and Rachel caused any harm to any defendant. Instead, at best, the evidence demonstrated that any harm caused by the RICO Matter was caused by the filing of the matter in the first place. For example, Judge Mundell testified that the harm she and her family suffered was from being named as a defendant and the possibility that the RICO Matter

would lead to criminal charges as set forth in a MCSO press release. October 3, 2011 Testimony at p. 106, ll 15 – 25; p, 107, ll 1 – 11; p. 110, ll 19 – 25; p. 111, ll 1 – 5; p. 114, ll 1 – 14 and 12 – 22; p. 115, ll 1 – 19. Judge Baca offered similar testimony. October 4, 2011 Testimony at p. 7-15. In this regard, Judges Mundell and Baca were no different than other defendants named in the RICO Matter who did not offer any testimony that the way the matter was litigated caused them harm. While attorney Ed Novak testified that the RICO Matter caused him harm personally and professionally, that harm was, as above, caused by the filing of the matter in the first place and the vague threat of a criminal indictment. October 3, 2011 Testimony at p. 33, ll 18 – 25; p. 34, ll 1 – 25; p. 35, ll 1 – 25; P. 36, ll 1 – 25; p. 37, ll 1 – 25; p. 38, ll 1 19. Finally, Maricopa County employees Smith, Wilson and Swanson offered similar testimony that any harm they suffered was caused by the filing of the RICO Matter and not the way it was litigated. See, September 26, 2011 Trial Testimony at p. 183, ll 17 -23; and September 27, 2011 Trial Testimony at p. 34, ll 14-25; p. 35, ll 2 – 7; p. 36, ll 11-16; p. 37, ll 10 – 16; p. 144, ll 9 – 16; p. 145, ll 16 – 22; p. 147, ll 2 – 25.

III. RACHEL DID NOT VIOLATE ANY RULE OF ETHICS

A. There is no evidence that Rachel worked on the RICO Matter for any improper purpose.

ER 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

Ariz. Sup. Ct. R. 42 § ER 4.4(a).

In order to prove that Rachel violated ER 4.4, IBC was required to present clear and convincing evidence that Rachel had an improper purpose that drove her actions in the RICO matter. *Matter of Levine*, 174 Ariz. 146, 154, 847 P.2d 1093, 1101 *reinstatement granted,* 176 Ariz. 535, 863 P.2d 254 (1993). In this regard, IBC, much as they have done since day one in this matter, attempted to portray Rachel as a political attack dog who would blindly follow the

directions of Mr. Thomas. To the contrary, the evidence in this matter demonstrated that Rachel was not in the inner circle of the MCAO and was, in fact, several layers of supervision removed from Thomas. Yet, IBC continues this theme in their closing brief by claiming that Rachel worked on the RICO Matter out of her desire to retaliate against "those who had acted against Thomas and the MCSO" and out of "obsession with Stapley, Irvine and others." IBC Proposed Findings of Fact and Conclusions of Law, at paragraph 286; IBC Closing Arguments, at p. 17, ll. 24-25. While it is true that in her own time Rachel is politically active and a prolific writer, none of this demonstrates that her actions were driven by a desire to retaliate against Mr. Thomas' political opponents.

To the contrary, the evidence at trial revealed that Rachel was initially reluctant to accept the assignment to work on the RICO Matter. However, after being told of the importance of the matter and being promised that she would be part of a team of lawyers led by Spaw, Rachel agreed. Such evidence does not demonstrate that Rachel set out to retaliate against anyone nor that she had an obsession to punish anyone. On the contrary, this establishes that Rachel agreed to the assignment because she understood it to be an important action designed to address perceived public corruption and based on the promise that she would be working with experienced counsel.

Moreover, the limited actions that Rachel took in the RICO matter do not so much as suggest that she was advancing a political vendetta. As set forth above, Rachel's role consisted of working with Spaw and Thomas to prepare the Amended Complaint and the MTD Response. In carrying out these tasks Rachel engaged in legal research and writing, attempted to learn the factual basis for the original RICO complaint and in doing so interacted ***exclusively*** with Spaw, Thomas, and other lawyers working on the RICO Matter for the Plaintiffs. At no point did she interact with any of the RICO Defendants or even their counsel. Nor did she seek documents or testimony from the RICO Defendants. Not surprisingly, none of the RICO Defendants testified that the limited way in which the RICO Matter was litigated caused them any harm. Instead, it was the filing of the RICO Matter which they claimed caused harm. Rachel, of course, had nothing to do with the initial filing.

Not surprisingly given her limited role and the lack of harm caused by the way in which the RICO Matter was litigated, the evidence cited by the IBC fails to establish the requisite improper purpose needed to establish by clear and convincing evidence a violation of ER 4.4. For example, IBC claims that Aubuchon and Thomas violated ER 4.4, because they "filed this case against 15 defendants with whom they had personal disagreements." Closing Argument at p 18, ll. 1-2. IBC fails, however, to explain how this allegation regarding Aubuchon and Thomas somehow demonstrates that Rachel violated ER 4.4. Put another way, no evidence was offered that the personal disagreements IBC proscribes to Thomas and Aubuchon motivated Rachel and led to her taking any improper act. Perhaps the only "evidence" cited by IBC in relation to ER 4.4. is their claim that Rachel was "adamant that the RICO complaint go forward." For support of this, IBC cites to the testimony of Jeff Duvendak that during a phone call with Rachel, Spaw, Eric Dowell and other lawyers at the firm of Ogletree Deakins, Rachel made a statement regarding her belief that certain RICO Defendants had knowledge of a particular memorandum. While Rachel may have made this statement, it hardly demonstrates by clear and convincing evidence that Rachel was "adamant" that the RICO matter go forward because she had an improper reason to do so. Indeed, while IBC cites to the testimony of Duvendack regarding this statement, they ignore the testimony of Spaw that after he and Dowell responded to Rachel that evidence would have to be located regarding the RICO Defendants knowledge of the memorandum, that Rachel did not object, did not make any further statement, and instead proceeded to make her best efforts to locate the facts supporting the action that Rachel was told by Thomas, Aubuchon and others existed. October 17, 2011 Trial Testimony at p. 144, l. 2-p. 145, l. 19. That others may have misled her or overstated the evidence does not demonstrate that Rachel violated ER 4.4.

The lack of evidence supporting the IBC's claim is further apparent from their citation to the *Matter of Levine*, 174 Ariz. 146, 161, 847 P.2d 1093, 1108 *reinstatement granted,* 176 Ariz. 535, 863 P.2d 254 (1993). Unlike Rachel, whose work on the RICO Matter was limited to working on an amended complaint and a response to a motion to dismiss, Mr. Levine was disciplined for "bringing groundless claims in bad faith over a period of years." IBC Proposed

Order at ¶285. Moreover, the finding that Mr. Levine had violated ER 4.4 was based on substantial evidence that he had brought multiple actions for improper purposes. For example, as the Supreme Court noted, Levine "has freely admitted that his subjective purpose in bringing the federal suit was to delay enforcement of the state court judgment until he could raise funds for a supersedeas bond, and when this was accomplished, he sought dismissal of the federal action." *Id.* There is no such comparable evidence in this matter as to Rachel. IBC has simply failed to meet their burden of presenting clear and convincing evidence that Rachel worked on the RICO Matter for any improper purpose. As such, the charge that she violated ER 4.4 should be rejected.

B. Rachel reasonably believed that the RICO action was well founded in fact and law.

ER 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.

Ariz. Sup. Ct. R. 42 § ER 3.1.

Bar Counsel effectively makes three arguments that Rachel's work on the Proposed Amended Complaint and Response to Motions to Dismiss were frivolous because (1) the allegations in the proposed amended complaint lacked a reasonable factual basis, (2) the response to the motions to dismiss and the proposed amended complaint were not well-founded in the RICO statute, 18 U.S.C. § 1962 *et seq.*, and the extensive case law analyzing that statute, and (3) that Arizona statutes and court rules limited Plaintiffs' ability to bring or maintain a RICO action in the first place. In order to sustain this claim, Bar Counsel must prove by clear and convincing evidence that Rachel's work on the RICO Matter was objectively unreasonable and, again, that her work was driven by an improper motive. *Levine*, 847 P.2d at 1100 (in determining a violation of ER 3.1 a Court should "consider[]both the objective legal reasonableness of the theory and the subjective motive of the proponent of the

claim."). Significantly, that the RICO Matter may have ultimately been unsuccessful or even that some or all of the motions to dismiss that were filed may have been granted, is of no consequence and does not demonstrate a violation of ER 3.1. To argue otherwise, suggests that any lawyer who loses a motion to dismiss may be sanctioned for that loss. Similarly, that Plaintiffs needed the "tools of discovery" to prove the veracity of their allegations does not evidence a violation of ER 3.1. *Law. Disc. Bd. v. Neely,* 528 S.E.2d 468, 473 (W. Va. 1998) ("we recognize that there are instances where an attorney has exhausted all avenues of pre-suit investigation and needs the tools of discovery to complete factual development of the case. An action or claim is not frivolous if after a reasonable investigation, all the facts have not been first substantiated. A complaint may be filed if evidence is expected to be developed by discovery. A lawyer may not normally be sanctioned for alleging facts in a complaint that are later determined to be untrue."). Thus, a lawyer need not be able to prove the truth of every allegation contained in a complaint before a complaint can be properly filed. Consequently, a lawyer does not act unethically by making allegations that may turn out to be wrong or that are dependent on how discovery proceeds. Instead, a lawyer complies with ER 3.1 by conducting a "reasonable inquiry" into the matters at issue. *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 557 (9th Cir. 1986), overruled on other grounds; *see also, United States v. Vastola*, 830 F. Supp. 250, 256 (D.N.J. 1993) *aff'd,* 25 F.3d 164 (3d Cir. 1994);*Refac Int'l, Ltd. v. Hitachi Ltd.*, 141 F.R.D. 281, 287 (C.D. Cal. 1991). Precisely what is reasonable is dependent on the situation with which a lawyer is faced without the benefit of hindsight. *Unioil*, 809 F.2d, at 558. Significantly, a reasonable inquiry includes relying on the statements and directions of other attorneys. ("reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry.").

Consequently, IBC does not meet their burden as to Rachel simply by claiming that the RICO Matter would have ultimately failed or that some of the allegations contained therein would not have been borne out by discovery. Instead, IBC must demonstrate by clear and convincing evidence that Rachel failed to make a reasonable inquiry into the matter ***and*** proceeded in order to vindicate an improper motive. Here, no such showing has been made.

Indeed, when the circumstances she found herself in and the efforts she made are considered—without the benefit of hindsightit is evident that Rachel proceeded reasonably. First, it cannot be ignored that Rachel played no role in preparing the initial RICO complaint. Instead, her first involvement with the matter began in late December 2009 when Thomas asked her to accept the assignment. At that point, Rachel was a relatively inexperienced litigator and she knew it. She also knew that a RICO case presented a host of complex issues and an extremely challenging area of the law. As such, she recognized that she was going to have to seek and obtain the assistance of more experienced attorneys in order to complete the tasks to which she was assigned. Rachel told this to Thomas, who then assured her that she would have the assistance of multiple experienced lawyers. Initially this took the form of Spaw, Duvendack and Dowell who, collectively with Rachel, set out in late December to come up with a plan of action as to how to proceed with the RICO Matter. This led to a conference call among the group on December 28, 2009. During this call it was decided—largely by Spaw and perhaps Dowell—that the first thing that needed to be done was to obtain the factual support for the original complaint and then to prepare an amended complaint. Rachel agreed with this decision, in part because she trusted the explanations given to her by more experienced attorneys. Significantly, at no point did Spaw or anyone else unequivocally state that the matter should be dismissed. In fact Spaw continued throughout to give Rachel instructions as to how to proceed. Rachel then set out to obtain the factual support that formed the basis of the original RICO complaint from Thomas, Aubuchon, Wells and others. IBC contends that such factual support did not exist. However, this was not known to Rachel at the time. Instead, the evidence demonstrates that Rachel was led to believe that it did. For example, Rachel was told by Thomas to obtain documents from Aubucbon and Wells and assured that those documents would set forth the basis upon which the RICO Matter was filed. Exhibit 415. Rachel then immediately contacted Aubuchon and Wells and obtained hundreds of documents. Exhibit 390.

In the interim, the Defendants began to file motions to dismiss the original RICO complaint. Indeed, no less than five separate motions to dismiss were filed. Each of these

motions needed to be reviewed, the arguments contained therein analyzed and many legal issues researched in order to prepare a response. By that time, Duvendack, Dowell and others had stopped working on the RICO Matter. Why this occurred was known to Spaw but not to Rachel. Exhibit 436. As a result, it was left to Spaw and Rachel, with assistance from Thomas, to work on the RICO Matter. At this point, Spaw and Thomas were in control and Rachel was relying on their experience and insight as she worked through complex and difficult legal issues in an extremely complex and challenging area of the law. That Spaw and Thomas were in control is evident from the various emails that demonstrate that Thomas was communicating changes to Spaw and that Spaw was considering Thomas' suggestions and making the relevant changes. *See e.g.*, Exhibits 404 & 407.

While it is not disputed that Spaw and Thomas' control over the matter did not relieve Rachel from her own duties to comply with the rules of ethics, it does bear on whether or not Rachel acted reasonably under the circumstances and whether or not she acted with malice or an improper purpose--as the IBC ***must*** prove by clear and convincing evidence. Here, Rachel acted reasonably because she had no reason not to trust in the direction and advice of Spaw and Thomas. Neither of them instructed her to abandon her work. To the contrary, she continually discussed her progress and was given not only guidance and advice in return but whole sections to include in the both the Amended Complaint and the MTD Response. This included, the decision to include the original complaint in the Amended Complaint, the arguments as to why Plaintiffs had standing, and perhaps most critically, the decision to stop working on the amended complaint and file it. Rachel was not free to ignore this instruction or any other order given her by Spaw or Thomas. Moreover, it cannot be ignored that after he instructed Rachel to stop work and move on to the Response it was Spaw in conjunction with Thomas who attempted to file the Amended Complaint using Spaw's assigned electronic court filing ("ECF") login and password. As confirmed by the ECF rules, using his password and login was the equivalent of Spaw's statement that the Amended Complaint was ethical and proper. Thus, as to Rachel, it is not the issue that the Amended Complaint may have been lacking factual support or did not properly set forth a RICO claim. Instead, the issue is whether a

reasonable young and inexperienced lawyer would have ignored the directions, instructions and advice of Thomas—the chief lawyer in Maricopa County and her boss—and a bureau chief who has been practicing law for more than thirty years and who was, at one time, a certified specialist by the State Bar. As one Court has held:

> ...as a practical matter, some attorneys within a law office are more knowledgeable about particular legal subjects and [...]other attorneys may reasonably rely upon the advice given them as authoritative. Thus, under the appropriate circumstances, an attorney who has undertaken a rudimentary level of research and who has had her understanding of the law confirmed by more knowledgeable and experienced colleagues, need not necessarily undertake further research in order to have performed a normally competent level of legal research.

Vastola, 830 F. Supp. at 256.

Applying this to the current matter, the answer is obvious—no young lawyer would have ignored the advice of such experienced and prominent lawyers. To suggest otherwise is to ignore reality and reason contrary to the purpose of the rules of ethics. ABA Model Rules of Professional Conduct, Preamble ("The Rules of Professional Conduct are rules of reason."). Instead, a young and inexperienced lawyer put in Rachel's situation would have acted no different than she did by working diligently, researching legal issues that were presented, obtaining what documents and evidence she could, and ultimately seeking and following the advice of senior experienced lawyers.

Not surprisingly, while the IBC attempts to justify discipline against Rachel on the claimed failings of the RICO Matter, they make no effort whatsoever to address the situation Rachel was in or to explain how a reasonable relatively inexperienced lawyer would have acted differently. In order to demonstrate that Rachel violated ER 3.1, IBC was required to make such a showing. Yet they cannot because the evidence demonstrates that Rachel made every effort to learn the factual basis for the RICO Matter until Spaw told her to stop work, spent substantial amounts of time researching and addressing the legal issues set forth in the various motions to dismiss, conducted countless hours of legal research, drafted and re-drafted portions

of both the response to the motions to dismiss until told to stop, and, time and again, raising countless legal issues with Spaw and Thomas in order to elicit their opinions and advice.

Perhaps recognizing the glaring lack of evidence that Rachel acted unreasonably under the circumstances, IBC attempts—once again—to attribute knowledge potentially held by Thomas, Aubuchon and Spaw to Rachel. For example, IBC points to the warnings given by Chief Deputy Phil MacDonnell as evidence that Rachel knew the RICO Matter lacked merit. Proposed Findings at ¶ 336. Yet there is no evidence that Rachel knew of MacDonnell's statement. The same is true of warnings made by Lotstein, Faull, and anyone else. IBC similarly cites to emails Spaw set criticizing the RICO Matter. However, these "warnings" were worthless "CYA" emails that were often quickly followed by Spaw giving Rachel direction or advice as to how to proceed. Had Spaw truly felt that all work on the RICO Matter needed to immediately cease he should have said so; indeed as her supervisor under the Rules of Ethics and the standards of the Maricopa County Attorneys' Office, Spaw was required to instruct Rachel to stop all work had he believed no other choice was ethical. Spaw knew this as Faull had advised him that Rachel was relatively inexperienced in civil litigation and that Faull expected Spaw to work closely with her and to provide appropriate help and supervision. Yet Spaw never gave Rachel such an instruction. Given this, while the evidence may demonstrate that Rachel was perhaps naïve for trusting Spaw and Thomas and that they failed in their roles as her supervisor, there is no evidence, let alone clear and convincing evidence, that Rachel violated ER 3.1 by acting in an unreasonable manner out of a desire to retaliate against Thomas' political enemies even if it is ultimately determined that the RICO Matter lacked a factual or legal basis.

Finally, it must be noted that no discipline, under ER 3.1 or otherwise, can be based on the IBC's claim that State law limited the RICO Matter. This is because it is Black Letter law that States may not place substantive limits on causes of action that arise under federal law. *See, e.g., Felder v. Casey*, 487 U.S. 131, 153, 108 S. Ct. 2302, 2314, (1988) ("[p]rinciples of federalism, as well as the Supremacy Clause, dictate that…a state law must give way to vindication of the federal right..."). To suggest otherwise runs afoul of the Supremacy Clause

of the United States Constitution. Thus, even if Arizona statutes or the Rules of the Supreme Court can be read to preclude some of the relief sought in the RICO Matter, it is irrelevant because state law simply cannot limit the reach of federal law.

C. Rachel was competent and diligent.

ER 1.1 provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Ariz. Sup. Ct. R. 42 § ER 1.1.

As with ER 3.1, whether or not an attorney provides competent representation can only be determined by evaluating the reasonableness of that lawyer's actions in the situation with which they were confronted and without the benefit of hindsight. *Matter of Wolfram*, 174 Ariz. 49, 55, 847 P.2d 94, 100 (1993). In this regard "an incorrect legal judgment, mistake of law, or improper strategy" does not equate to a "knowing or intentional derelictions of a lawyer's duty to his client that should warrant discipline." *Matter of Myers*, 164 Ariz. 558, 561, 795 P.2d 201, 204 (1990). As the commentary to ER 1.1 explains:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question…

Ariz. Sup. Ct. R. 42 § ER 1.1 cmt.

As the commentary further explains:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly-admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such

> as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study.

Ariz. Sup. Ct. R. 42 § ER 1.1 cmt.

Accordingly, that Rachel may have been relatively inexperienced or not have worked on other significant complex litigation matters is irrelevant. At the same time, the fact that the law surrounding the RICO statute is extremely complex such that it presents a challenge for even the most experienced attorney must be also considered. In this regard, the fact that motions to dismiss were filed or that the complaint needed to be amended does not evidence incompetence. Instead, in order to prove that Rachel provided incompetent representation in the RICO Matter, Bar Counsel was required to demonstrate by clear and convincing evidence that the time and effort Rachel exerted in learning the area of RICO law and preparing the response to the motions to dismiss and the proposed amended complaint was insufficient. Yet, the evidence is to the contrary as it demonstrated that Rachel recognized the difficult but important assignment that she was given, that she was going to need the help of guidance of more experienced attorneys, and then that she dedicated herself to learning a complex area of the law so that she could identify and address the multitude of issues that the RICO Matter presented. Exhibit 357. Simply put, through hard work and exhaustive research, Rachel evidenced all the signs of a competent and effective lawyer.

That the RICO Matter may not have ultimately been successful does not evidence that Rachel was incompetent without evidence that any failings in the RICO Matter are directly attributable to the work Rachel did or did not do. Further, any such evidence must be considered in light of the fact that the evidence demonstrates that it was not Rachel who was ultimately making decisions in the RICO Matter but Spaw and Thomas. For example, any evaluation of the Amended RICO Complaint as to the competency of the drafters must take

into account that it was Spaw who ordered Rachel to stop work on the Amended Complaint, and Thomas and Spaw who made the decision to file it. Consequently, Professor Goldstock's opinions regarding the RICO Matter are, by themselves, worthless as they offer nothing more than what effectively is a motion to dismiss analysis of the Complaint and Amended Complaint. *See e.g.*, October 19, 2011 Trial Testimony at p. 138, ll. 10-15 ("...I limited my analysis solely to the question of whether or not the basic RICO concepts were laid out properly in the two complaints."). Instead, IBC was required to present evidence that linked the supposed failures in the RICO Matter to actions taken or not taken by Rachel in order to demonstrate her lack of competence. Yet no such evidence was offered, and indeed Professor Goldstock stated that he had no opinions to offer as to any of the Respondents "motives," that any of the Respondents had an "improper motive," or that any rules of ethics were violated by any of the filings in the RICO Matter. *Id.*, at p. 158, l. 18-p.159, l. 5. Indeed, Professor Goldstock admitted that he did not know which attorney (whether a Respondent in this matter or not) had done what in relation to the RICO Matter. *Id.,* at p. 159, ll. 6-23.

In sum, while the IBC has gone to great lengths to try to prove deficiencies in the RICO Matter, they have failed to demonstrate that any such deficiencies were the result of incompetent work on the part of Rachel. As such, IBC has failed to prove by clear and convincing evidence that Rachel was incompetent.

D. Rachel did not have a conflict of interest that precluded her from working on the RICO Matter.

ER 1.7 provides:

> (a) ...a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Ariz. Sup. Ct. R. 42 § ER 1.7.

IBC alleges that Rachel—and every single other lawyer in the MCAOshould have declined to work on the RICO Matter because of a conflict of interest. Specifically, Bar Counsel claims that Rachel's representation of Thomas and Arpaio was directly adverse to another client – the Maricopa County Board of Supervisors and its individual members – and that her representation of Thomas and Arpaio was limited by her own "self-interest" and "personal animosity." However, as to Rachel, the IBC has offered no evidence to support this contention. This is because it is undisputed that Rachel ***never*** represented the Board of Supervisors or any of its individual members. Indeed, the evidence demonstrated that Rachel never so much as met, let alone represented, any of the members of the Board of Supervisors. Thus, Rachel's supposed conflict is not related to matters in which Rachel was assigned, but based upon the remarkable argument that ***all*** deputy county attorneys were conflicted from working on the RICO Matter. Quite literally, the IBC bases its claim that Rachel violated ER 1.7 on the theory that she had a conflict because the supposed conflict of Thomas and/or Aubuchon was imputed to Rachel and "any attorney in MCAO…" Argument, at p. 21, ll. 18-19. However, such a position ignores the fact that courts have recognized that a prosecutor's office is not like a private law firm and will only be disqualified in its entirety in extreme circumstances. In this regard, the standards of ER 1.10 do not typically apply to public lawyers. Instead, public entities are typically evaluated under ER 1.11. Ariz. Sup. Ct. R. 42 § ER 1.10 ("The disqualification of lawyers associated in a firm with former or current government lawyers is governed by ER 1.11."). Significantly, unlike private law firms, the implementation of screening measures designed to "wall-off" those lawyers who may be personally disqualified on a matter resolves any potential conflict of interest. *State ex rel. Romley v. Superior Court In & For County of Maricopa*, 184 Ariz. 223, 228, 908 P.2d 37, 42 (Ariz. App. 1995)("in most cases an effective screening mechanism will satisfy the defendant's interests and permit implementation of the policy change underlying ER 1.11(c)."). Moreover,

because of the unique role and importance of government lawyers, the rules regarding conflicts and imputation of conflicts are less strictly applied. As the commentary to ER 1.13 notes:

> Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context.... ***in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.*** Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.

Ariz. Sup. Ct. R. 42 § ER 1.13 (emphasis added; internal citations omitted).

The commentary further instructs that the differences between public and private lawyers exists because:

> Government lawyers also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so
> *Id.*

Thus, the IBC's proposed blanket rule that no MCAO lawyer could work on the RICO Matter or other actions related to the Board of Supervisors, is a position that the rules of ethics appears to reject. Moreover, the MCAO did have a screening procedure in place which led to Rachel being transferred out of the executive division to work under Spaw. *See e.g.*, October 12, 2011 Trial Testimony, at p. 102, l. 25 to p. 103, l. 6. That the procedure may not have been reduced to writing, does not take away from the fact that it was applied in relation to the RICO Matter and led to Rachel being transferred out of the Executive Division. As the evidence at trial demonstrated, Rachel was assigned to the Civil Forfeiture Division of the Maricopa County Attorney's Office under the supervision of Spaw, for two purposes (1) to, of course, provide Rachel assistance, experience and resources in handling the RICO Matter, and (2) to effectively screen-off any conflicted lawyers such as Aubuchon and other lawyers. Thus, there was no conflict of interest that can be imputed to Rachel, and IBC has failed to meet their evidentiary burden.

IBC's claim that Rachel was also limited by her own self-interest and animosity is equally devoid of evidence. While IBC weakly argues that "to a lesser extent Alexander, had been involved in earlier proceedings and disagreements with each of the defendants in the RICO action," Argument, at pp. 20, ll. 8-9, a review of their proposed findings of fact and conclusions of law confirms that Rachel in-fact had no such involvement. Indeed, at trial the only evidence offered by IBC of Rachel's involvement in disputes between the MCAO and ***any*** of the RICO defendants, related to a compilation of quotes given to the media, not by members of the BOS, but by certain Maricopa County Superior Court Judges regarding the Proposition 100 Race Based Court dispute. Yet, even this occurred somewhat in isolation as Rachel played no role in the resolution of that dispute. IBC offered no evidence whatsoever that Rachel played any role in any of the thirteen or more disputes between the BOS and MCAO that the IBC claims limited Thomas' judgment. Proposed Findings at ¶¶352—353; *see also*, Argument at pp. 21, l. 15 to p. 22, l. 17. Having failed to present any evidence, let alone clear and convincing evidence, that Rachel's judgment was limited by other disputes or that the supposed conflicts of Thomas could be imputed to the entire MCAO, the IBC has failed to demonstrate that Rachel violated ER 1.7.

E. State supreme court rules cannot limit relief available under federal law..

ER 3.4.(c) provides that:

> A lawyer shall not:
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Ariz. Sup. Ct. R. 42 § ER 3.4(c).

IBC contends that Rachel violated Ariz. Sup. Ct. R. 48(l) by "predicating the RICO action in part on alleged Bar complaints or statements to the Bar about Thomas..." Complaint, at ¶372. As set forth above, the United States Supreme Court has made clear that state law may not place limits on federal law. Of course there is nothing remarkable about this proposition of law as this is the ***very*** purpose of the Supremacy Clause contained in the United States

Constitution. U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). As one Court has noted, the Supremacy Clause "gives priority to federal rights created by a federal statute when they conflict with state law." *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 806 (D. Mass. 1982) *aff'd,* 707 F.2d 23 (1st Cir. 1983); see also *Testa v. Katt*, 330 U.S. 386, 391, 67 S. Ct. 810, 813, 91 L. Ed. 967 (1947) ("the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing in the Constitution or Laws of any State to the contrary notwithstanding."). Thus, to the extent that an Arizona rule gives immunity from civil suit to the filer of a bar complaint, such a rule must give way to a cause of action that is created by federal law, such as a RICO action. This is the heart of the Supreme Court's decision in *Felder v. Casey, supra,* which further confirms that IBC's claim that Rachel violated a Court rule, in violation of ER 3.4(c), fails as a matter of law.[1]

F. Rachel's arguments for the abrogating of judicial immunity were based on well established precedent.

It is professional misconduct for a lawyer to:

> (d) engage in conduct that is prejudicial to the administration of justice.

Ariz. Sup. Ct. R. 42 § 8.4(d).

In order to demonstrate a violation of this rule, IBC must prove by clear and convincing evidence not that Rachel's conduct ***may*** have been prejudicial to the administration of justice, but that there actually ***was*** a "nexus between the conduct charged and an adverse effect upon

[1] Of course, the IBC's claim also fails because, while it is true that the filing of bar complaints for improper purposes is mentioned in the RICO Complaint, this was not the basis for the action. Instead, it was simply one allegation that formed the factual basis for the RICO action, as related to Rachel. As the Rule makes clear only actions that are "predicated" on the filing of a bar complaint runs afoul of Rule 48(l).

the administration of justice." *People v. Jaramillo*, 35 P.3d 723, 731 (Colo. O.P.D.J. 2001); *See also, In re Alcorn*, 202 Ariz. 62, 71, 41 P.3d 600, 609 (2002) ("Wasting weeks of court time and inconveniencing jurors and witnesses in a sham proceeding is a paradigm of" a violation of E.R. 8.4(d)). In this regard, IBC contends that Rachel violated E.R. 8.4(d) by arguing in the Response to the Motion to Dismiss that "judicial immunity did not apply to the judges because they had committed acts outside the scope of their judicial duties." Proposed Findings of Fact at ¶ 363. This supposedly evidences a violation of ER 8.4(d) because the IBC contends that "[j]udicial immunity is absolute." Proposed Findings of Fact at ¶ 362.

However, despite the allegations to the contrary, Rachel did not argue that the RICO Defendants were not entitled to immunity without support in the law. This is because, although it is often also referred to as "absolute immunity," judicial immunity is, in fact, ***not*** absolute. As the Supreme Court of the United States has recognized, judicial immunity is a powerful defense but, however powerful, it is set aside in two established circumstances: "our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (internal citations omitted). Artfully, in the response to the motions to dismiss, Rachel acknowledged the potential entitlement to judicial immunity, and then set forth an argument, supported by case law and specific allegations of the complaint, as to why the judges who were defendants in the RICO Matter were not entitled to absolute immunity because their conduct was outside "the scope of their judicial offices" and thus taken without appropriate jurisdiction. Exhibit 195 at p. 40, l. 13 to p. 41, l. 23. That these arguments were countered in the various replies filed in support of the motion to dismiss or even ultimately rejected by the District Court does not evidence unethical behavior.

Additionally, no evidence was presented that demonstrated that the arguments made by Rachel in the Response actually adversely affected the "administration of justice." While the Response was filed by Spaw on January 29, 2010, the RICO Matter was dismissed little more

than a month later on March 11, 2010. In the interim, no in-court activity took place, let alone activity that wasted the time of the District Court. Surely, had such wasteful activity occurred, Judge Snow would have appropriately sanctioned Rachel or Spaw. Yet, he did not. Moreover, none of the Judges who were RICO Defendants testified that their own judicial activities were adversely impacted by the filing of the response to the motion to dismiss. Indeed, as set forth above, in relation to the RICO Matter, none of the Judges testified that they were affected by anything other than the filing of the original complaint in which Rachel played no part. As such, IBC has failed to demonstrate by clear and convincing evidence that Rachel violated ER 8.4(d).

G. Although Rachel contested some of the actions of Bar Counsel, she did so while at the same time cooperating with the screening investigation.

In a screening investigation, Ariz. Sup. Ct. R. 54 requires a lawyer to "cooperate with officials and staff of the state bar" and "to furnish information or respond promptly to any inquiry or request from bar counsel." While this rule requires an attorney to cooperate with the investigation by furnishing information, it does not require that an attorney refrain from objecting to actions they reasonably believe are improper. Indeed, the rule could not preclude such objections because attorneys, no different than other licensed professionals, are entitled to due process in matters related to their licenses. *See e.g., In re Lewkowitz*, 70 Ariz. 325, 334, 220 P.2d 229, 234 (1950). Thus, while a lawyer must cooperate with an investigation of his or her conduct, a lawyer may, at the same time, retain counsel, contest the actions of bar counsel, and otherwise defend themselves.

Here, while Rachel certainly filed or joined in certain filings to the Probable Cause Panelist and the Supreme Court during the screening investigation phase, she did so because she and undersigned counsel believed that there was a good faith legal and factual basis to do so and that the various filings, if granted, would do nothing more than ensure that she received due process throughout the matter. Significantly, at no point did Rachel decline to cooperate or refuse to provide information. To the contrary, Rachel provided a comprehensive response to Bar Counsel's request for information in a timely manner, Exhibit 369, as the IBC admits.

Findings of Fact at ¶ 479. Further, Rachel offered to meet with Bar Counsel to answer questions about her actions and what occurred during the RICO Matter. Exhibit 371. Admittedly, that meeting never took place, but only because IBC declined to agree to reasonable and customary ground rules such as the presence of a court reporter to record the proceedings and some basic disclosure so Rachel could prepare for the meeting. While IBC appears dismissive of Rachel's efforts in this regard, even a cursory review of her response reveals that Rachel responded substantively to each of the charges made against her by providing specific facts as to what occurred and, where appropriate, legal precedent supporting the positions or actions she took. Rachel's cooperation in this regard is wholly unlike the examples of lawyers disciplined for their failure to cooperate by the IBC. Proposed Findings of Fact at ¶481. For example, Rachel did not fail to respond to a screening investigation despite three requests that she do so, nor did she ignore multiple efforts to contact her, as the attorney did in the matter titled *In Re Garza*, 2009 WL 2005427 (AZ.Disp.Com.) *8-9 ("the attorney in State Bar provided Respondent with a second and a third opportunity to submit written responses to the screening letters. Respondent still failed to respond; James Lee, Senior Bar counsel at the ACAP, made numerous unsuccessful attempts to contact Respondent by phone. Respondent did not respond to these multiple phone calls until March 1, 2008 when Respondent called Mr. Lee and left a message."). Similarly, Rachel did not provide an "incomplete and untimely response." *In Re Howell*, 2008 WL 5413039 (AZ.Disp.Com.) *7. Instead, she provided a comprehensive response on the day agreed upon by IBC and her counsel. Moreover, unlike Howell and Garza, Rachel's supposed insufficient cooperation did not actually prevent the IBC from completing their investigation. *Id.*, ("Because of his incomplete and untimely response, it is exceedingly difficult to re-create what was going on in the Martwick case and the State Bar was hampered in its ability to prove its case by Respondent's refusal to cooperate.").

Finally, while IBC claims that the various motions in which Rachel joined were frivolous, they failed to offer any evidence to demonstrate this. Indeed, all IBC points to is the fact that the motions were denied. This alone fails to demonstrate that the motions were

frivolous. In the end, due process permits Rachel to contest that which she viewed as improper while at the same time complying with her duty to provide information to the IBC. As such, IBC has failed to demonstrate by clear and convincing evidence that Rachel failed to cooperate with the screening investigation of her.

IV. POTENTIAL SANCTIONS.

As set forth above, the IBC has utterly failed to present clear and convincing evidence that violated any rule of ethics and this matter should be resolved in Rachel's favor. However, if it is determined that Rachel violated an ethical rule, there is no evidence that she did so knowingly or intentionally. Under the ABA Standards, "knowing" behavior is established by objective factors including the situation in which the prosecutor found him- or herself and clear and convincing evidence of actual knowledge and intent. *In re Zawada*, 208 Ariz. 232, 237, 92 P.3d 862, 867 (2004). Instead, the evidence demonstrates at most that Rachel was negligent and that her actions were isolated incidents that have no danger of being repeated. As such, IBC's claim that Rachel should be suspended should be rejected, because in order to demonstrate that Rachel should be subjected to such a severe punishment the IBC was required to demonstrate by clear and convincing evidence that Rachel knowingly violated a rule of ethics. *See e.g.*, 4.52 ("Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer ***knows*** he or she is not competent, and causes injury or potential injury to a client."), ABA Standards 5.22 ("Suspension is generally appropriate when a lawyer in an official or governmental position ***knowingly*** fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.") and 6.22.("Suspension is generally appropriate when a lawyer ***knows*** that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.") (emphasis added).

Neither can Bar Counsel prove that Rachel caused injury or potential injury to any client, party, or to the legal process. At best, any injury or potential injury relating to the RICO Matter was caused by the filing of the original complaint before Rachel became involved. As such, even if Bar Counsel had established misconduct on Rachel's part (which it did not), only

a low level of discipline such as reprimand or admonition—can be justified. For example, in relation to conflicts of interest, ABA Standard 4.3 which concerns conflicts of interest, establishes admonition as the appropriate sanction for a lawyer "who engages in an isolated instance of negligence" in determining the existence of a conflict. ABA Standard 4.34. Reprimand is appropriate when the failure to determine the existence of a conflict causes injury. ABA Standard 4.33. Similarly, in relation to a lawyer's supposed failure to maintain the public trust, ABA Standard 5.24 establishes that admonition is appropriate where the evidence demonstrates that the lawyer's actions were an isolated incident that caused little injury. Where some injury is demonstrated, then reprimand is the appropriate sanction. ABA Standard 5.23.Finally, in relation to legal process, only admonition or reprimand is appropriate without a showing of a knowing or intentional misuse of the legal system. ABA Standard 6.23 & 6.24.

Additionally, pursuant to ABA Standard 9.3, it is apparent that any discipline given Rachel must be reduced. This is because it is undisputed by IBC that Rachel has no prior disciplinary record and was at the time of the RICO Matter relatively inexperienced in the practice of law. ABA Standard 9.32(a)&(f). Further, the evidence at trial demonstrated that Rachel did not have a dishonest or selfish motive and instead worked on the RICO Matter because she had a good faith belief based on what she was told and saw that it was being pursued for the greater good. Rachel also presented uncontradicted evidence that she has a good character and reputation, both personally and professionally. Accordingly, ABA Standard 9.32(b)&(g) require a further reduction in any discipline imposed.

Bar Counsel's argument alleges that the following aggravating factors apply to Rachel: (1) multiple offenses [ABA Standard 9.22(d)], (2) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency [ABA Standard 9.22(e)], and (3) refusal to acknowledge wrongful nature of conduct [ABA Standard 9.22(g)]. However, the evidence in the record does not support the application of any of these factors.

First, the charges against Rachel relate to one factual scenario—her work over a 90-day period on the RICO Matter. As such, Rachel has not committed multiple offenses of

misconduct and ABA Standard 9.22(d) is thus inapposite to her conduct at issue in this proceeding. *Cf. In re Abrams*, 257 P.3d 167, 171 (2011) (applying multiple offenses aggravating factor to judicial officer's separate actions regarding a sexual relationship with one attorney and sexual harassment of another attorney).

Second, ABA Standard 9.22(e) applies only when an attorney fails to cooperate in good faith with the State Bar. *See, e.g., Matter of Riddle*, 175 Ariz. 379, 381-82, 857 P.2d 1233, 1235-36 (1993) (respondent asked that response to Bar's complaint be confidential, failed to submit a non-confidential response, and failed to participate in the disciplinary proceeding); *Matter of Fresquez,* 162 Ariz. 328, 329-31, 783 P.2d 774, 775-77, 781 (1989) (respondent prepared false, backdated letter during Bar's investigation, submitted false affidavit to the Bar, and lied under oath during the disciplinary proceedings). Here, there is no evidence that Rachel undertook any action during this proceeding out of bad faith. Instead, Rachel cooperated with Bar counsel's investigation even if she objected to some of their actions.

Finally, Rachel did not refuse to acknowledge her conduct. To the contrary, Rachel expressed regret that she acted with less than all the information. IBC's citation to an article written by someone else and which is one of hundreds posted to a political discourse website maintained by Rachel hardly demonstrates that she refuses to acknowledge her wrongful conduct such that any increased discipline should be levied against her. At most, it demonstrates the intense scrutiny to which the respondents have been subjected in this matter. As Rachel testified, she posted the article, not because it contained a paragraph criticizing these proceedings, but because it acknowledged the situation she was in as a relatively inexperienced lawyer working on a complex and political matter:

> Q: Why did you post that article?
>
> A: I was being beat up in the media so much, every day there was more horrible articles about me, I thought if somebody finally wrote a nice one, that's why I put it up that.

November 2, 2011 Trial Testimony, at p. 55, l, 23-P. 56, l. 2.

In doing so, Rachel did not intend to demean or insult these proceedings. *Id.*, at p. 56, ll. 20-25.

In sum, based on the ABA Standards, any discipline levied against Rachel must be no more than a reprimand or admonition. Under the Supreme Court Rules this means that at most Rachel should receive a censure for her role in the RICO Matter. Any more discipline would ignore the relevant ABA Standards, the IBC's failure to present any evidence that Rachel knowingly violated a rule of ethics, the evidence of several mitigating factors, the lack of any aggravating factors and would be excessive punishment for a young inexperienced lawyer who was failed by the more experienced lawyers upon whom she relied.

The IBC's citation to *In re Zawada*, *infra*., confirms that, at most, censure is the appropriate result. Thomas Zawada, a prosecutor, was found to have violated various ethical rules and as a result publically censured. *In re Zawada*, 208 Ariz. 232, 235, 92 P.3d 862, 865 (2004). On appeal, the Supreme Court increased the discipline to a six month suspension because the evidentiary record established "egregious prosecutorial misconduct." *Zawada*, 208 Ariz. at 236, 92 P.3d at 866. This included evidence that established "with utmost clarity that Zawada knowingly disobeyed" Court rules. *Zawada*, 208 Ariz. at 237, 92 P.3d at 867. Suspension was also warranted because Zawada's actions caused significant harm as it resulted in an accused murderer being set free. *Zawada*, 208 Ariz. at 238, 92 P.3d at 868 ("Disciplinary Commissioner Cahill spoke accurately in his dissent from the Commission's recommendation: 'Simply put, [Zawada's] knowing, deliberate and intentional misconduct either caused a murderer to walk free, or it helped convict an innocent man of first-degree murder. Either way, no harm could be more serious."). Here, IBC failed to present sufficient evidence that establishes with any "clarity" that Rachel knowingly violated any rule of ethics. Similarly, the IBC failed to present evidence of any significant harm caused by Rachel's actions. As such, if Rachel is to be disciplined—despite the IBC's failure to present evidence warranting discipline a suspension is simply inappropriate and represents nothing more than a gross overreaching by the IBC. It also should be noted that Rachel has already suffered considerably as a result of this highly publicized matter. Rachel has been stalked via the internet by an individual who would

harass her about every tweet emanating from the trial, forcing her to get a restraining order against him when the attacks escalated. Her personal website, which she had built up to over 4000 unique visitors per day, was hacked and consequently banned from Google. Oddly, one of the IP addresses associated with the hacking came from within Maricopa County government. Consequently, the inclusion of Rachel in this matter has already severely hurt her professional which she will likely never get back. *See generally*, November 2, 2011 Trial Testimony at p. 55, l. 24-P. 56, l. 15.

V. CONCLUSION.

Based on the foregoing, after the hearing in this matter, it is apparent that Rachel acted in a manner that was ethical, reasonable, and appropriate. At a time of great turmoil in Maricopa County, she was tasked with a difficult, political, and high-profile case. At the same time information was hidden from her, and experienced lawyers she relied on failed. Despite this, Rachel relied on her skills as a lawyer to identify the matters at issue, prioritize her tasks, and proceed in a manner that best advanced her clients position within the bounds of statutory and common law authority. In doing so, Rachel Alexander did not violate the Rules of Ethics and she should be exonerated of all charges brought against her.

DATED this 17th day of January, 2012.

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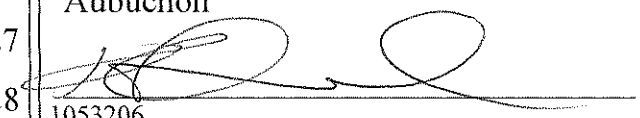

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